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IN THE

Supreme Court of the United States

OCTOBER TERM—1968

No. 1300

BOND TRANSPORTATION, INC.,
Petitioner,

vs.

EDWARD A. COX,
Respondent.

BOND TRANSPORTATION, INC.,
Petitioner,

vs.

MICHAEL F. MURPHY, etc., and DENNIS MURPHY,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF NEW JERSEY

BRIEF IN OPPOSITION

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Statute and Regulations Involved

49 U. S. C. A. 304 (e) (printed in Petitioner's Appendix A, pp. 30a to 31a) authorizes the Interstate Commerce

Commission to prescribe, with respect to the use by motor carriers of motor vehicles not owned by them, in the furnishing of transportation of property, regulations requiring that:

> (1) any lease, contract or other arrangement shall be in writing and be signed by the parties thereto,
>
> (2) it shall specify the period during which it is to be in effect,
>
> (3) it shall specify the compensation to be paid by the motor carrier, and
>
> (4) it shall require that during the entire period of such lease, contract, or other arrangement a copy thereof shall be carried in each motor vehicle covered thereby.

The Statute further authorizes the ICC to prescribe any other regulations as may be "reasonably necessary in order to assure that while motor vehicles are being so used the motor carriers will have full direction and control of such vehicles and will be fully responsible for the operations thereof in accordance with applicable law and regulations, as if they were the owners of such vehicles."

Pursuant to this authorization, the ICC adopted regulations which are found in 49 C.F.R., Part 207—Lease and Interchange of Vehicles (printed in Petitioner's Appendix A, pp. 2a to 13a). They provide that an "authorized carrier" may not use equipment which it does not own unless there is a written lease (Section 207.4(a)(2)) for a minimum duration of 30 days (Section 207.4(a)(3)) which:

> "Shall provide for the exclusive possession, control and use of the equipment, and for the complete assumption of responsibility in respect thereto, by the lessee for the duration of said contract, lease or other arrangement * * *." (Section 207.4(a)(4).

The duration of the contract, lease or other arrangement shall coincide with the time for the giving of receipts for the equipment (Section 207.4(a)(6)), and when possession by the authorized carrier ends it shall obtain from the owner of the equipment a receipt specifically identifying the equipment and stating therein the date and time possession thereof is taken (Section 207.4(b)).

Both statute (49 U. S. C. A. 304(e)) and regulations (Section 207.4(c)) provide for safety of operation and inspection of equipment.

The authorized carrier, during the period of the lease, contract or other arrangement shall properly and correctly identify itself on the leased motor vehicle, and if a removable device is used to identify the authorized carrier as the operating carrier, it shall be on durable material and "bear a serial number in the authorized carrier's own series" (Section 207.4(d)). Upon termination of the lease the authorized carrier shall remove any legend showing it as the operating carrier before relinquishing possession of the equipment (Section 207.4(d)(1)).

Statement

The New Jersey Supreme Court stated that the basic issue involved is whether by reason of the ICC regulations petitioner, Bond Transportation, Inc., as an authorized carrier, should be deemed to have had such possession and control over the leased motor vehicle at the time of the accident as to make it liable for negligent operation (Petitioner's Appendix B, p. 64a).

The facts are fully set forth in the decision of the Court (Petitioner's Appendix B, pp. 64a to 69a), from which it found that there was ample evidence for the jury to determine that the leased motor vehicle was in the exclusive pos-

session, control and use of the authorized carrier, that it had been engaged to operate in intrastate and interstate commerce, that the carrier qualified it to operate in interstate commerce, that it did in fact drive in interstate commerce and at the time of the accident it was engaged in an activity which was at least in part for the benefit of the carrier.

Thus there was sufficient evidence from which the jury could have found and did find that a lease existed between the owner of the leased motor vehicle and the authorized carrier at the time of the accident, that the carrier's name and ICC serial number were affixed to the leased vehicle, and that no receipt for the equipment had been secured by the carrier from the owner. Under those circumstances the provisions of Section 207.4(a)(3) of the ICC regulations, heretofore cited, apply, and in accordance therewith the leased motor vehicle is in the exclusive possession and control of the authorized carrier which assumes complete responsibility for operation.

The obligation rests upon the carrier to terminate the lease, obtain a receipt from the owner and remove its name and ICC serial number in order to avoid responsibility for future operation.

Even though the owner of the leased vehicle was driving home after the day's work for the carrier, the New Jersey Supreme Court noted that the proof justified a factual inference from which the jury could find that such operation served the special interest of and was of business benefit to both the carrier and the lessor (Petitioner's Appendix B, pp. 82a to 83a).

Reasons for Denying the Writ

1. The decision of the Court below is neither in conflict with nor contrary to the apparent thrust of the decisions

of various Circuits of the United States Court of Appeals cited by petitioner.

Costello v. *Smith,* 179 F. 2d 715 (2d Cir. 1950) and *Venuto* v. *Robinson,* 118 F. 2d 679 (3d Cir. 1941), cert. denied, 314 U. S. 627 (1941) have no application to these proceedings because they arose prior to the amended statute and ICC regulations heretofore cited. At the time *Costello* and *Venuto* were decided it was permissible for an authorized carrier to lease a motor vehicle to transport cargo on a one-way trip basis. When the cargo was unloaded, the lease and responsibility of the carrier terminated.

In *Costello* a collision occurred on the return trip. Judge Swan stated that if the accident happened on the outbound trip during the term of the lease the lessee-carrier would have been liable, but no liability could be imposed after the lease terminated. He noted,

> "So long as the properly constituted authority is content not to regulate further than it has the operation of empty trucks after the termination of a 'one-way lease', the courts may not properly by judicial decision supplement the commission's regulations."

Subsequently the regulations were amended as heretofore cited to require a 30 day minimum lease, and it is conceded by petitioner that the lease was in existence at the time of this accident (Petition, p. 3, footnote 1).

In *Venuto* plaintiff sought to recover for personal injuries not on grounds of statutory liability, but based upon the common law responsibility of one for negligent acts of another. The accident occurred while the trucker was hauling cargo for a common carrier and the recovery was affirmed on appeal. This 1941 decision is totally inapplicable to the case at bar.

In *Mellon National Bank & Trust Co.* v. *Sophie Lines, Inc.*, 289 F. 2d 473 (3d Cir. 1961) the Court held that even though the leased motor vehicle was in operation for some third person without the permission or knowledge of the authorized carrier, the latter is liable for negligent operation when its name and serial number appear on the equipment and it has not obtained a receipt for return of the vehicle to the lessor-owner. Indeed, respondents cited this case in support of their position, and the New Jersey Supreme Court relied upon it (Petitioner's Appendix B, pp. 85a to 87a).

Finally, *Gudgel* v. *Southern Shippers, Inc.*, 387 F. 2d 723 (7th Cir. 1967) is readily distinguishable. Here the appellate court found that there was insufficient evidence from which the jury could conclude that the leased motor vehicle was undertaking the business of the carrier at the time of collision. The evidence was overwhelming that the lease had been canceled two days prior to the accident and the carrier had not given any instructions to the owner or driver of the vehicle to undertake the carriage on that day. Petitioner quotes an excerpt from the case (Petition, p. 7) which confirms respondents' position that it is a question of fact whether the contractor is carrying out the carrier's undertaking.

None of these cases suggests that intrastate movement while under lease to an authorized carrier pursuant to the ICC regulations exempts the carrier from responsibility of operation, particularly when the movement is at least in part for the benefit of the carrier.

None of these cases are remotely in conflict with the decision of the New Jersey Supreme Court. Even *dicta* cannot be culled from these decisions to infer such a proposition.

2. In the past a conflicting State Court case of another jurisdiction has not ordinarily resulted in a grant of *certiorari* where the case at bar is in accord with the decisions of all other State Courts and all United States Courts.

In *Missouri Pacific Railroad Co.* v. *Elmore and Stahl,* 377 U. S. 134, 84 S. Ct. 1142, 12 L. Ed. 2d 194, reh. den., 377 U. S. 984, 84 S. Ct. 1880, 12 L. Ed. 2d 752 (1964) a decision of the Supreme Court of Texas reviewing ICC rules appeared to be in conflict with an almost contemporaneous decision of the United States Court of Appeals for the Ninth Circuit. *Certiorari* was granted. In contrast, the New Jersey Supreme Court decision is not in conflict with the decision of any United States Court.

Although it can be argued that the New Jersey Supreme Court decision is in conflict with that of one state court, *Schmidbauer* v. *Baltimore & Pittsburg Motor Exp. Co.,* 228 Md. 627, 181 A. 2d 325 (Ct. of App., Md., 1962), this, in itself, is insufficient grounds for *certiorari.* The New Jersey Supreme Court merely noted the apparent conflict (Petitioner's Appendix B, p. 84a) and the cited numerous cases from other states and Federal Courts in support of its decision (Petitioner's Appendix B, pp. 84a to 95a).

Simon v. *McCullough Transfer Co., Inc.,* 155 Ohio St. 104, 98 N. E. 2d 19 (1951) and *Eckard* v. *Johnson,* 235 N. C. 538, 70 S. E. 2d 488 (1952), cited by petitioner, are inapplicable since they arose years before the statute was amended and the ICC regulations adopted; and in both cases the lease had terminated.

Petitioner argues that the matter is in dispute as between State Courts of final resort and must be settled by the United States Supreme Court (Petition, p. 8). In all candor, petitioner should argue that it is the 1962 Maryland Court of Appeals case which is in conflict with State Courts of final resort and United States Courts of Appeal.

The New Jersey Supreme Court decision is in accord with every other State and all United States Courts of Appeal.

3. The decision of the New Jersey Supreme Court is in accord with a previous decision of the United States Supreme Court and with the legislative intent of the Congress.

In *American Trucking Associations* v. *United States,* 73 S. Ct. 307, 344 U. S. 298 (1953) Justice Reed reviewed the history of the statute and regulations, noting that prior to the requirement that leases be in writing, many were oral and some were concluded after one trip. Commenting upon this, he stated:

> "The use of nonowned equipment by authorized carriers is not illegal, either under the Act or the rules under consideration. But evidence is overwhelming that a number of satellite practices directly affect the regulatory scheme of the Act, the public interest in necessary services and the economic stability of the industry, and it is on these that the rules focus. * * * It was also alleged, and shown by evidence of some incidents, that the Commission's safety requirements were not observed by exempt lessors. * * * (344 U. S. at pages 304 and 305).
>
> "Because of the fact that the great bulk of the arrangements cover only one trip, leasing carriers have little opportunity or desire to inspect the equipment used, especially in cases where the agreement is made without the operator's appearance at the carrier's terminal. * * * Hence the carrier may not extend the supervision of rest periods, doctor's certificates, brakes, lights, tires, steering equipment and loading, normally accorded his own employees

> and vehicles, to equipment and drivers secured through lease. And the owner-operator himself is called upon to push himself and his truck because of the economic impact of time spent off the road and investment in repairs on his slim profit margin. Further, the absence of written agreements has made the fixing of the lessee's responsibility for accidents highly difficult." (344 U. S. at 305).

In response to an attack upon the regulations by the American Truckers Association, Justice Reed continued:

> "Moreover, we must reject at the outset any conclusion that the rules as a whole represent an attempt by the Commission to expand its power arbitrarily; there is clear and adequate evidence of the evils attendant on trip leasing. The purpose of the rules is to protect the industry from practices detrimental to the maintenance of sound transportation services consistent with the regulatory system." (344 U. S. at 310).

Congress enacted an amendment to 49 U.S.C.A. 304 (e) (1) and (2) on August 3, 1956 (Public Law 957, Chap. 928, 70 Stat. 983) (printed in Petitioner's Appendix A, pp. 30a and 31a) which clearly delineated its delegation of authority to the ICC, permitting it to adopt the regulations heretofore cited.

The legislative history of this Act, known as Senate Bill 898, appears in Volume 3, "U. S. Code Congressional and Administrative News", 84th Congress, 2nd Session, 1956, pages 4304 through 4307, and in the Congressional Record (House), Vol. 102, Part 9, page 12743. Excerpts from the report follows:

> "The affirmative authority granted to the ICC by this legislation will strengthen the Commission's au-

thority to deal with the abuses which have arisen from trip-leasing practices. * * *

"The leasing practices of authorized motor carriers have in the opinion of the ICC, presented troublesome problems for many years. * * *

"The entire Commission made its report on May 8, 1951 (52 M.C.C. 675) in which it adopted rules * * * requiring that every lease by an authorized motor carrier for the use of a motor vehicle is to be operated for the authorized carrier by the owner or by an employee of the owner of the vehicle, must be of at least 30 days duration and that compensation must be on a basis other than a division or percentage of revenues earned with the leased equipment.

"The Commission stated, in substance, that its rules were essential to maintain effective control over the operational safety, carrier responsibility and the economics of the motor carrier industry. * * *

"The Commission found, among other things, that in many instances when authorized carriers trip-lease vehicles owned by others the safety requirements imposed under Part II of the Act are not observed; that the practice of trip leasing makes it difficult to fix carrier responsibility; * * *"

The clear intent of the legislature is to provide for safety and fix responsibility in regard to those leased motor vehicles which an authorized carrier qualifies for interstate carriage. Having chosen to qualify its leased equipment for interstate carriage, and having used it previously in interstate carriage, petitioner cannot now avoid its fi-

nancial responsibility resulting from negligent operation merely upon the pretext that at the moment of operation the vehicle was not traveling interstate.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be denied.

Respectfully submitted,

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